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No. 8996.

IN THE

Supreme Court

OF THE

State of California.

The People of the State of California,

Plaintiffs and Respondents,

vs.

The Gold Run Ditch and Mining Company,

Defendant and Appellant.

Respondents' Points and Authorities.

ATTORNEY-GENERAL and
GEO. CADWALADER,
Attorneys for Appellants.

A. L. RHODES,
I. S. BELCHER,
RICHARD BAYNE,
Of Counsel.

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THE PEOPLE OF THE STATE OF CALIFORNIA,
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vs.
THE GOLD RUN DITCH AND MINING COMPANY,
Defendant and Respondent.

Plaintiff 's Appeal.

Respondents' Points and Authorities.

This was a case in equity brought in the name of the People of the State of California by the Attorney-General of the State, assisted by other legal counsel, to prevent the increase of a great public nuisance, and was tried before a learned Judge selected by the Governor of the State for this especial purpose.

The object of the action was three-fold:

I.

To prevent the further obstruction and impairment of the navigation of the Sacramento River

below its junction with the American, arising from the flowing into it of the tailings, popularly called "mining debris," from the hydraulic mine of the defendant. Such mine, in connection with other mines of a similar character, having largely obstructed and impaired the navigation of such river—and threatening through their intended operations—of doing still greater damage of the same sort in the future, and unfortunately having a greater ability to do so from the already great diminution in the depth of the water flowing in such river, and consequent loss of both its scouring and transporting power.

II.

To preserve for habitation and cultivation the riparian lands on the designated part of the Sacramento, and also on that section of the American River from its mouth, eastward to a point called Alder Creek, such lands having a frontage on both rivers of at least two hundred miles, and in addition thereto acquiring protection for Grand, Sherman, and other equally well-known islands. These riparian lands, though most largely devoted to orchards, stock and other farms, formed the sites of numerous towns, villages, and one city, contained roads, bridges, burying grounds, and a system of levees costing several millions of dollars. Such lands are formed of the richest of alluvial soil, where grow in great profusion the most valuable of the agricultural and horticultural products of the State, and in almost endless variety.

Some of these lands had gone to form a greatly widened river channel; other portions had sand piled upon it Olympus high; others had received deposits of the sticky compound of clay and sand called—generically, "slickens;" other parts back-water stood upon until after the planting and growing season had passed and became willow and cotton-wood swamps, while other large areas would only grow late crops. There were other evils, such as destruction of roads, washing away of bridges and bridge approaches, covering of cemeteries, loss of cellars, and those numberless inconveniences bound to swamp any country so unfortunate as to have its rivers and creeks, (natural drains,) either filled up, or so raised up—that the most ordinary rain-fall insured a flood—and an over-flow—save where the levees afforded protection from the latter.

III.

To prevent the continued deterioration in the quality of the water flowing in such rivers—rapidly arriving at the point of unfitness for any purpose.

But One Nuisance.

All these were the constituting elements of one great overshadowing public nuisance caused by the *operation of the defendant's mine*, in connection with other hydraulic mines.

The Gold Run Mine.—Its Location, Surroundings and General History.

Nowhere in California is the power of water more noticeable than in that section of the North Fork of the American River between Giant's Gap and Cape Horn, and it is here—perched on the south slope of the divide near the little village of Gold Run, in Placer County, about one mile from the North Fork, by way of a short tributary of it, called Cañon Creek (having a grade of 1,000 feet to the mile)—is located the Gold Run Mine It is owned by a mining corporation of nearly the same name, and its operations—though beginning in 1872—did not reach much magnitude before 1876. It has an artificial water supply of not less than 2,150 miners' inches—about forty millions of gallons—which is largely increased by natural contributions of rain water. Its banks are very high, and the pressure under which water is used in its mining operations is about 275 feet. It uses the most approved processes, such as little giants or monitors, great iron pipes—and electric lights—for night work. It has not been a lucrative mine, as the assessments, have more than counterbalanced the dividends, nor is the earth worked by it rich in gold. It has, as the Court declares, only from 5 to 20 cts. of gold per cubic yard in it.

What is Yet to Come.

It contains 20,000,000 yards of material yet to be washed and deposited in the North Fork, which will occupy the next thirty years. This mine deposits its tailings into Cañon Creek, from whence they go into the North Fork—at the rate of 4,000 or 5,000 cubic yards on each working day—or, at least, 600,000 cubic yards every five months. (Finding 8, Folio 161-2.)

This is an exceedingly low estimate—far below that of the State Engineer, who had studied and written upon the subject—and materially below the estimate of the superintendent and principal owner of the mine. (Gould, page 5283.)

A Splendid Procession.

As the ordinary two-horse team hauls about 1¼ cubic yards of earth, the Court will readily see the enormous length of the procession of such teams requisite to haul and dump into Cañon Creek the annual deposit of that mine. According to the exceedingly moderate estimate of Judge Temple, it would take 480,000 teams to haul 600,000 cubic yards. These teams would stretch away (300 occupying a mile) 1,600 miles.

The North Fork—

above the mouth of Cañon Creek—is a perennial stream, in which flows vast quantities of water of exceeding purity and swiftness—until fouled by a junction with Cañon Creek. Notwithstanding the

deposits from the defendant's mine since 1875, and the fact found in this case that from the top workings thereof (by other parties) between 1865 and 1875, 67,000,000 of cubic yards of tailings had passed into this stream from Cañon Creek, no deposit remained there, and this illustrates the great transporting power of the water of the North Fork. This stream—twenty miles below Gold Run and nearly abreast of Auburn—is joined by the Middle Fork—and about the same distance below—two or three miles above Folsom, is joined by the South Fork, where the Main American—so called, begins. The power of these streams, in their highest stages, is beyond description. Gwynn, at vol. , page , shows that one of them broke a cable tested to resist 2,500 tons. Carroll, at vol. , page testified that near Folsom, and after rising 40 feet, the water of the Main American—broke loose from its moorings a four-storied grist mill, 100 feet square, containing nine runs of burr stone, the nether ones of which were bolted to the solid rock. While Knight, vol. , page , witnessed during the 1868 flood in that vicinity, and ascertained by an actual and fair test that the current thereof was carrying a saw log at the rate of twenty miles per hour. The Court found the transporting power of the American was vastly in excess of the power requisite to transport the heaviest material issuing from the dump of the Gold Run Mine, it also found that all the tailings of the Gold Run Mine would find their way to the Sacramento Valley and that a great deal of them

passed currently there, either in suspension or by crawling along the bottom of the stream, and that a good deal of the hard rock part of the mine's output was turned to sand and clay by attrition as it was swept along in the river channel.

It will be found by refering to the testimony of the State Engineer, Hall, vol. page 4295-9, that without taking into consideration the sand traveling at the bottom of the stream, that $32\frac{86}{100}$ of the mining debris travelled with the water in suspension—so much for the river and the Gold Run Mine, upon whose high banks it is located.

The True Phase of the Suit.

The complaint, while it described the features of the nuisance and accounted for its origin, did not demand any indemnity for losses occasioned by it, but simply asked for the cessation of additions to it—in view of the great and growing danger which they implied.

Indeed, these can be laid out of this controversy (as unnecessary for its solution) what caused the filling up of the beds of the Sacramento and American rivers—existing at the commencement of this suit.

Equally is the natural regimen of the Sacramento River an unimportant and a nonhelping consideration to defendant, for if it was imperfect originally, or has been made worse by a badly devised levee system, the greater the

reason, the more potent the necessity—requiring that its channels be kept free from further impositions of hydraulic mining debris, and for insisting that deep, swift and reasonably pure currents of water should alone be suffered to traverse them in order to cut out and remove existing deposits, instead of the shallow, lazy, hog-wallow like and debris-ladened currents which constantly increase the earthy obstructions in such already over-burdened channels.

This suit is of very easy solution, according to the principles of equity in the light of the proposed continued deposits of the Gold Run mine for the next thirty years, and of the following Findings, and without regard by whom and when the river-beds were filled up.

Thus taking the second Finding, (folio 157) it will be seen from it—

"That since 1862 the navigation of said river has been seriously impaired by deposits of mud and sand therein, which have come in part from the hydraulic mines, so that now the city of Sacramento can be reached by boats of deep draft *during high stages of the water only*, instead of at all times, as formerly."

And by the sixth (folio 155)—

"That the tailings and deposits from said hydraulic mines, with other matter, carried by the waters of said rivers, have filled up and raised the beds and channels of said Sacramento River to a great extent, below the mouth of the American River, from 6 to 12 feet, and the American River, below Alder Creek, from 10 to 12 feet, and in places even more; such filling has been materially increased by the tailings from the hydraulic mines; such fillings have shallowed the channels of the Sacramento River and materially impaired the naviga-

tion thereof, and have materially increased the liability of the Sacramento River and of the American River, below Alder Creek, to overflow their banks, and have caused the frequent floods of said rivers to be more destructive than they otherwise would have been. That the debris from mines, including the mine of the defendant, has materially contributed to such filling of the river channel, and thereby has interfered with and obstructed the free and comfortable use and enjoyment of large portions of the land upon the American and Sacramento Rivers."

And by the 11th Finding (folio 163), reading—

"That the power of water to preserve its channels and to clear out and carry off deposits in the same is proportioned—other conditions remaining the same—to the depth of the stream and the freedom of said water from earthy matters. That the beds of said rivers have already become so widened and filled that the depth of the water therein has been greatly lessened. That said water at all times is heavily laden with earthy matters, chiefly from mines; *therefore said rivers are likely to fill more rapidly in the future in proportion to the quantity of hydraulic tailings than in the past.* That thousands of acres of good land in the Sacramento Valley have already been covered by such debris, *and if some preventive is not applied, much further and greater injury is likely to ensue in the future*, and large tracts of land will probably be rendered within a few years unfit for cultivation and inhabitancy."

Twelfth Finding—

"That the discharge from the defendants' and other mines so fouls the water of the American River at all points below as to make said water unfit for any domestic use by the inhabitants."

The fourteenth Finding reads—

"That if the acts of the defendant and others mining as aforesaid are allowed to continue, *there is imminent danger* that the beds and channels of the lower portion of the American River and of the Sacramento River, below the mouth of the American will be so filled and

choked up by tailings and other deposits, that said rivers will be turned from their channels, cutting new water-ways, injuring or destroying immense tracts of land, and probably will result in greatly impairing the navigability of the Sacramento River."

And the twenty-first, (folio 175,)—

"That the acts threatened to be performed by the defendant in continuing to prosecute its mining industry in the manner set out in these Findings, *as it will do, unless restrained,* if allowed to be done, will in connection with like acts by others, obstruct the navigation of the Sacramento River and fill up to some extent, Suisun Bay, destroy or injure large amounts of land, and constitute an obstruction to the free use and enjoyment of the property of a large number of citizens of this State."

By such tests, in view of the nature of this suit and the relief asked—which is purely preventive in its character—the qualified opinion of the Court below, expressed in its General Finding, at folio 199, is without any relevance. We refer to that part—to which our adversaries give such unfair and exaggerated importance, which states—

That he (the Court) was unable to say that the defendant's mine, without the debris from other mines, materially contributed to the evils mentioned (although the largest contributor thereto) or in other words, if there were no mining operations save those of the defendant, I am not prepared to say that it would materially injure the valley lands or the navigation of the river. It is the aggregate of debris from all the mines which produces the injuries mentioned.

This of course is all in the past tense—relates to the injuries inflicted up to the time of the filing of the bill, and does not relate to or qualify the statements describing the imminent and increasing danger from future operations of the defendant,

growing out of the filled up condition of the river and the pressing necessity for immediate relief, implied by the dreadful and detailed consequences following its refusal. In another sense it is illustrative of the immensity of the aggregate of the mining debris.

An Axiom in Equity.

But this General Finding is in accord and not opposed to the Judgment, for who can deny the proposition —

"That if it be true that it is the aggregate of the mining debris which is responsible for the nuisance described, and that the defendants' mine is the largest single contributor thereto, how is the nuisance to be curtailed or abated unless the defendant is restrained?"

If this be incorrect, how can it be said that Courts of Equity have the power to prevent the erection or continuance of nuisances?

We herewith subjoin, beginning with part 2, certain propositions, authorities and references to the record in support thereof, which afford, as we think, a full answer to the different positions appearing in the points of our adversaries.

We however take the liberty of suggesting that the main point for consideration is—in view of its being conceded that it is *the mining debris* which is responsible for the nuisance described in the Complaint, and that the various evils which constitute it are growing in destructiveness in a rapidly increasing ratio—*whether or not the defendant and others of its class are licensed by law to continue their mining operations.*

Point 2.

The State has a Right to Sue Whenever an Individual may do so. It Sues and Defends by its Proper Officer, the Attorney-General. Wherever the Rights and Interests of the State are Concerned the Attorney-General, by virtue of the Inherent Powers of his Office, may Sue or Defend in Behalf of the State.

As was very lately said (of the Attorney-General) by the Court in bank in the case of the *County of Sacramento* vs. *The Central Pacific Railroad Company*, (10 Pacific Coast Law Journal, 27,) "he is the law officer of the State." This case was approved in a case of the same title reported in 61st Cal., 250, and was followed by the Circuit Court of the United States in some of the celebrated tax cases.

In—

People vs. *Stratton*, 25 Cal., 242,

the Court, on page 246, after adverting to the Act of 1850, concerning the office of Attorney-General, and observing, that nowhere in the Act is it made the duty of the Attorney-General to institute any action in a Court of original jurisdiction on behalf of the State or otherwise, said:

"The Act, as already observed, does not make it the duty of the Attorney-General to institute any action on behalf of the State in any Court of

original jurisdiction, and from this silence, it is argued on behalf of the respondent, he can have no such power without the aid of legislative enactment. But can this be so, when the nature and objects of the office are considered?

"The Attorney-General is the law officer of the State, and he is classed as belonging to the Executive Department of the Government. The Governor is the chief executive of that department, and by the Constitution it is made his duty to see that the laws are faithfully executed, and to this end he must have the authority in order to execute the powers belonging to his high office, to call to his aid, when necessary, the services of this law officer. In England the Attorney-General was from an early period denominated an officer of State. He was elevated to the high position by letters patent granted by the King, and he was the legal representative of the Crown in the Courts of law and equity; he exhibited informations and prosecuted for the Crown in criminal cases; he filed bills in the exchequer in revenue cases and informations in chancery respecting matters in which the Crown was interested. (Fortesque, Ch. 50).

In *Commonwealth* vs. *Fowler*, 10 Mass., 293, it was held that the Solicitor-General had the right, *ex-officio*, to file an information against a person for usurping a public office, and in that case Mr. Chief Justice Parsons said:

'An information for the purpose of dissolving a corporation, whether created by charter under the seal of the Commonwealth or by statute of the Legislature, may be prosecuted either under the authority of the Legislature, to be exercised in each particular case, or by the Attorney or Solicitor-General, acting *ex-officio* in behalf the Commonwealth.'

The question as to the right of the Attorney-General of this State, *ex-officio*, to file an information in the nature of a bill in chancery, to annul a patent for lands granted by the State to an individual, is one perhaps of difficult solution; but by analogy to the powers exercised by officers of like character in England, and in most, if not all of the States of the American Union, *we think he may do so in a case where the matter involved in the suit immediately concerns the rights and interest of the State.*"

Judge Davis. in delivering the opinion of the Court of Appeals, in—

The People vs. *Booth* (32 N. Y., 397), said:

'The people of the State, like all other parties to actions, must show an interest in the subject matter of the litigation, to entitle them to prosecute a suit and demand relief.'

The remedy to prevent the erection of a purpresture and nuisance in a bay or navigable river, is by injunction at the suit of the people by their Attorney-General. For all the people of the State are interested in the question and have the right to use all bays and navigable rivers within the State; and I think the Attorney-General may maintain an action in the name of the people of the State to prevent the obstruction of a public highway, which all the people have a right to travel, because all of them have an interest in such highways."

The Attorney-General has the power belonging to that officer at common law, and such additional authority as the Legislature has conferred upon him. By the common law he was authorized to

interfere to restrain illegal corporate action, and the commission of acts producing a public nuisance—or breaches of trusts for charitable purposes.

In the *People* vs. *Miner*, 2 Lansing, 396.

Mullen, J.—in point directly—said:

"Before the adoption of the Code, there had been no attempt by the Legislature to enumerate the cases in which the Attorney-General might institute suits or proceedings for the enforcement or protection of the rights of the people, or of individuals. The office of the Attorney-General had existed several centuries in England before the formation of the Colonial Government in this country, and his duties were well understood and quite clearly defined.

Most, if not all, of the Colonies appointed Attorney-Generals, and they were understood to be clothed with nearly all the powers of the Attorney-Generals of England, and as these powers have never been enforced, we must go back to the common law in order to ascertain them. The Attorney-General had the power, and it was his duty;

1st. To prosecute all actions necessary for the protection and defence of the property and revenues of the Crown. * * * * * *

7th. By information to Chancery to enforce trusts and to prevent public nuisances and the abuse of trust powers * * * * * *

As the powers of the Attorney-General were not conferred by statute, a grant by statute of the same or other powers would not operate to deprive him of those belonging to the office at common law, unless the statute either expressly or by

reasonable intendment forbade the exercise of powers not thus expressly conferred. He must be held therefore to have the powers belonging to the office at common law, and such additional powers as the Legislature has seen fit to confer upon him.

There is nothing in the code which manifests the intention to take from the Attorney-General any of his common law powers, which under our institutions and laws he could properly exercise."

The remedy to prevent the erection of a purpresture and nuisance in a bay or navigable river is by injunction at the suit of Attorney-General.

Wat. Eden on Injunct., Vol. 2, Ch. 11.
Attorney-General vs. *Richards*, 2 Anstruther, 603.

The State, by its Attorney-General, may Sue in a Court of Equity to Restrain a Public Nuisance.

Att'y-General vs. *Utica Ins. Co.*, 2 Johns, Ch. 370-380.
People vs. *Davidson*, 30 Cal., 279.
Rowe vs. *Granite Bridge Co.*, 21 Pick., 344.
Trustees, etc., vs. *Brady*, 4 Paige, Ch. 510.
People vs. *Vanderbilt*, 26 N. Y., 387.
Att'y-Gen'l vs. *Cohoes Co.*, 6 Paige, 133.
2 Story, Eq. J., § 921.
Columbus vs. *Jaques*, 30 Ga., 506.
Parish vs. *Stephens*, 1 Oregon, 73.
Hamilton vs. *Whiteridge*, 11 Maryland, 128.

Walker vs. *Shephardson*, 2 Wis., 384.
Bradsher vs. *Lea*, 3 Ired., Ch. 301.
State vs. *Mayor of Mobile*, 5 Porter, 279.
Att'y-Gen'l vs. *N. J. R. & T. Co.*, 2 Green's Ch'y, 136.
Illinois, etc., Canal Co. vs. *St. Louis*, 2 Dillon, 90.
City of Georgetown vs. *Alexandria Canal Co.*, 12 Peters, 98.
Angell on Water Courses, § 565.

In *Yolo County* vs. *Sacramento*, 36 Cal., 193—the public as well as the profession were advised—that where there was imminent danger of irreparable mischief from a public nuisance, "*that equity may interpose and abate the nuisance upon the information of the Attorney-General.*"

The capacity of the State to maintain the action, is not to be tested by the provisions of the Statute prescribing the duties of the Attorney-General, but, on the contrary, the authority of the Attorney-General is to be tested by the solution of the question—*whether the action is one in which the State has a direct interest.* The proposition is true beyond all doubt—that all actions on behalf of the State must be brought by the Attorney-General, unless the Statute confers that authority upon another official or person. This proposition will be further considered hereafter.

The Obstruction of the Navigation of the Sacramento and American Rivers is a Public Nuisance.

This point needs no argument for its support. Every law writer upon the subject of nuisances, mentions the obstruction of the navigation of the navigable waters of a Kingdom or State, as a public nuisance, and places it in that regard, on the same footing as an obstruction of a highway. The cases are numerous in which the Courts have granted relief as against acts which constitute obstructions of navigation, sometimes by indictment and abatement, and at other times, by proceedings in equity.

See Definition of Nuisance, C. C., § 3479–80;
C. C. P. § 731.

The acts complained of in this case constitute a Public Nuisance.

They injure and render impassable the public highways. In causing the rivers to overflow, they are injurious to the large numbers of persons occupying the lands in the valleys of those rivers. They render the waters of the rivers impure and unfit for use. They destoy or impair the productiveness of large bodies of land situate in the vicinity of those rivers.

The State may maintain an Action in Equity to Prevent or Abate a Public Nuisance.

It is said in—

2 Story, Eq. Juris., § 923-4.

"In cases of public nuisances, properly so called, an indictment lies to abate them, and punish the offenders. But an *information* also lies in Equity to redress the grievance, by way of injunction."

And declares, that informations have been maintained to restrain and prevent such as are threatened, or are in progress; and the remedy is complete through all future time. It is promptly administered, *and before the injury has become irreparable.*

People vs. *Davidson*, 30 Cal., 379,

was a bill in Equity, brought by the Attorney-General of California to restrain the erection of a wharf in the Bay of San Francisco. No question was made as to the power of the State to maintain the action, or as to the authority of the Attorney-General to institute the suit; and no doubt on that question is intimated by the Court, though the case was elaborately argued and fully considered upon what was supposed to be, all questions that could arise.

The Court of Appeals, in—

People vs. *Vanderbilt*, 26 N. Y., 295–8,

sustained an information for an injunction brought

by the Attorney-General, to restrain the erection of a crib for a pier in the harbor of New York.

The jurisdiction of the Court of Chancery in England, of suits in Equity in cases of nuisance, is undoubted.

2 Eden on Injunction, 259.
Att'y-Genl. vs. *Richards*, 2 Anst., 603.
Att'y-Genl. vs. *Parmeter*, 10 Price, 378.
Att'y-Genl. vs. *Burridge*, 10 Id., 350.

The last three cases being for encroachments upon Portsmouth Harbor.

Which is further illustrated in—

Att'y-Genl. vs. *Johnson*, 2 Wils. Ch., 87.
Att'y-Genl. vs. *Forbes*, 2 Mylne & Craig, 129.
Att'y-Genl. vs. *Cleaver*, 18 Ves., 211, *and notes.*

A State, without any special authorization, may maintain an action for breach of contract made with it, or for the redress of its wrongs. It possesses this right by virtue of its sovereignty, and it requires no special authorization, either by the Constitution or the Statute.

State of Pa. vs. *Wheeling Bridge*, 13 How., 560.
Delafield vs. *State of Ill.*, 2 Hill, 162.
State of Ind. vs. *Worram*, 6 Hill, 36.

Neither § 470, Political Code, nor any other section of that Code or of the Code of Civil

Procedure cited by the defendant, undertakes to define the power of the Attorney-General. Those several sections merely provide for the performance of certain duties by that officer. He is a constitutional officer, and many powers and duties necessarily pertain to the office which may not be enumerated in the Statutes. That is the doctrine of—

Love vs. *Baehr*, 47 Cal., 364-7.

While it may be said that a conclusive argument cannot be drawn from the precedents in this State; yet if it is not conclusive, it is very convincing that many of the cases to which reference is made, would justly be regarded as absurd, if the Attorney-General had no authority to institute the actions.

The following are cases in which actions were brought by the Attorney-General, in the name of the State:

People vs. *Jackson*, 24 Cal., 630,
People vs. *Morrill*, 26 Cal., 336.
People vs. *Carrick*, 51 Cal., 325.

And were actions to annul patents for lands, issued by the State, and in the last two, the right of the State to have the patents annulled is sustained. But the Statute contained no express authority to the Attorney-General to institute the actions.

People vs. *Shearer*, 30 Cal., 645,

was an action to compel an assessor to assess the interests of certain persons in lands.

People vs. *Board of Supervisors*, 44 Cal., 613,

was certiorari to review the action of the Board in striking off certain assessments.

People vs. *Ashbury*, 44 Cal., 616,

was mandamus to compel the entry on the tax list of certain assessments that had been attempted to be cancelled.

People vs. *Supervisors of Kern*, 47 Cal., 81,

was prohibition to restrain the levy of a tax to raise money to purchase a toll road.

There is no Statute directing the Attorney-General to bring actions of the character of the above, relating to revenue.

People vs. *State Board of Education*, 49 Cal., 684,

was certiorari to the Board to annul its order relating to school books.

People vs. *Board of Education*, 54 Cal., 375,

was certiorari to the Board for a similar purpose.

People vs. *Board of Education*, 55 Cal., 331,

was mandamus, involving a similar question. Yet no Statute can be found authorizing the Attorney-General to institute such actions.

People vs. *Supervisors of San Luis Obispo*, 50 Cal., 561,

was mandamus to compel Board of Supervisors to issue bonds.

People vs. *Broadway Wharf*, 31 Cal., 33,

was brought to recover a wharf.

People vs. *Reclamation Dist.*, No. 108, 53 Cal.. 346,

was brought for the purpose of abrogating that District.

People vs. *Parks*, 58 Cal., 624,

was brought to restrain the defendants from proceeding under the Act to "promote drainage."

A comparison of the Codes with the Statutes previously in force, will show that the provisions of the Code are as ample in the respect in question, as those of the previous Statutes. The only sections of the Codes expressly conferring authority, are those cited by the defendant.

Pol. Code, §§ 470, 601, 2546.
Code C. P., §§ 803, 864, 1272.
Civil Code, §§ 382, 1405.

These sections neither require nor authorized that officer to bring an action of the nature of any of those above mentioned. In all of those cases, the authority of the Attorney-General came from a higher source than the Statute.

If an individual should prepare to erect, or threaten to erect a wharf, to extend into the bay, beyond the line established by law, a private person could not maintain an action to prevent the erection of the wharf, and if the State could not institute the action by the Attorney-General, it would be necessary for the State to delay until the mischief had been done, and then attempt to correct it by an indictment. (See 2 Sto., Eq. Juris., § 923-4.)

It will not be doubted, that if a patent be issued for lands contrary to law, the patent may, by the decree of the Court, be annulled; and it will be conceded that a private person *cannot* maintain an action for that purpose. If this be so, the action must, of necessity, be instituted by the State; and there is no way known to the law, in which the action can be brought, except by the Attorney-General. Many other illustrations might be given, of matters similar to those involved in the above cited cases, all tending to support the proposition, that where a cause of action accrues to the State, and no special provision is made for the bringing of the suit by some other officer, it must be brought by the Attorney-General. The decision in—

Love vs. *Baehr*,

cannot be sustained upon any other principle. If that officer possesses only such powers as the Statute may confer, it is impossible to hold that the Legislature may not impose any duty or function upon him, that is not committed by the Constitution to a particular department or officer. The

authority, we claim, comes from the same source and in the same manner as that which is exercised by County Supervisors. In—

People vs. *Eldorado*, 8 Cal., 61,

the Court say: "In using the word 'Supervisors,' the Constitution intended to adopt it with its known meaning, and in the sense in which it was generally understood. The word 'Supervisors,' when applied to County Officers, has a legal signification."

There are in the Constitution many other terms employed to confer by implication governmental powers and functions.

The Constitution contains no definition of the term *law*, or *legislative power*, or *judicial power*, or *Surveyor-General*, or *Assessor*, or *Collector*. From the "known meaning" of the term assessor, all the powers of those officers have been deduced, subject of course, in their exercise, to legislative control. Relying upon the "known meaning" of the terms *judicial power*, and *court*, the judicial department of government has constantly exercised powers neither defined nor prescribed by Statute, and, in some cases, in defiance of an attempted control by the Legislative department. It is unnecessary here to discuss the question as to the extent of the control over the office of Attorney-General that may be exercised by the Legislature; but it is sufficient to repeat, that he is the Law Officer of the State, and is authorized to control all litigation on the part of the State, which is not by law committed to another officer.

It is well known that under the Federal Constitution States may sue and be sued in the Supreme Court of the United States. If California should sue, by her Attorney-General, in that forum, it would sound rather strange to hear of a motion made to dismiss such a suit on the ground that it had been brought without authority. Again, if a suit brought against California was defended by her Attorney-General, would it not be equally ridiculous to say that her law officer—her Attorney-General—could not be heard for want of statutory authority to appear and defend?

Wood on Nuisances, at Sec. 819, observes—

"In cases of nuisances purely public, the proper remedy is by bill in the name of the Attorney-General, or of the people, instituted by him.

Attorney-General vs. *Steward*, 21 N. J. Eq., 346.

Other law officer of the State.—In those States where there is such an officer as an Attorney-General he may institute such proceedings, but it seems that even in those States such proceedings may be instituted by a State's Attorney or a District Attorney."

District Attorney vs. *Lynn R. R. Co.*, 10 Gray Mass., 242.

Attorney-General vs. *Woods*, 108 Mass., 436.

Attorney-General vs. *Lombard*, (W. N. C.) Penn., 489.

Point 3.

The defendant as a contributor to the production or maintenance of a nuisance is liable, although many others contributed thereto, and its act alone did not create or constitute the nuisance, but the combined effect of which is to create an actionable injury.

Wood on Nuisances, Sections 808 and 831.
The King vs. *Trafford*, 1 Barn. & Adol., 874.
Thorpe vs. *Brumfit*, L. R. 8 Chy. Appeals, 654.
Woodyear vs. *Schafer*, 57 Maryland, 1.
Hillman vs. *Newington*, 57 Cal., 56.
2 Hawkin's Pleas of the Crown, Chap. 2, Section 89.
2 Hale's Pleas of the Crown, Ch. 174.
People vs. *Kane*, 8 Wendell, 203.
Duke of Buccleugh vs. *Cowan*, 5 Macp. 214.
McAuley vs. *Roberts*, 13 Grant cases, 565.
Crossley vs. *Lightowler*, L. R. 2 Chy. Appeals, 478.
Sutton vs. *Clarke*, 6 Taunton, 29.
Mitchell vs. *Torbutt*, 57 Term R., 651.
Chipman vs. *Palmer*, 77 N. Y., 51. (Admits this to be the rule in equity.)
Hillman vs. *Newington*, 57 Cal., 56.

Illustration :—A and B sued to abate a nuisance caused by the smoke of their forge, cannot defend, on the ground that it takes their smoke combined with C's to make the nuisance complained of.

Wood, sec. 830.

In *Attorney-General* vs. *Terry* (L. R., 9 Chy. Appeals, 423) it is held that *where there is an indictable nuisance there is a co-ordinate remedy in chancery by injunction.*

Point 4.

So where the Nuisance has resulted from the acts of the defendant, combined with natural causes, the defendant is, nevertheless, liable. It is sufficient that "the act of Man" contributed to its existence.

Wood on Nuisances, Secs. 116 and 830.
Beach vs. *People*, 11 Mich., 103, 106.
Rogers vs. *Barker*, 31 Barb., 447.
People vs. *Townsend*, 3 Hill, 479.
Wilson vs. *City of New Bedford*, 106 Mass. 261.
Monson vs. *Fuller*, 15 Pick. 554.
Ball vs. *Nye*, 99 Mass., 582.
Pixley vs. *Clark*, 35 N. Y., 520.
Fletcher vs. *Ryland*, L. R. 1, Exch. 265. (3 House, Sec. 330.)
Neal vs. *Henry Meigs*, Term 17.
Bigelow vs. *Newell*, 10 Pick. 348.
Salisbury vs. *Herchenroder*, 106 Mass., 458.

Point 5.

Although the difference between Trespass and Nuisance is that in the latter the wrongful act causing the damage is not, as in Trespass, directly committed upon the injured premises, yet all concerned in the commission of the wrong—whether landlords or tenants, principal or agents, servants or employees, aiders or abettors—are liable and cannot object to the abatement of the nuisance.

Fish vs. *Dodge*, 4 Denio, 311.
Marshall vs. *Colton*, 44 Georgia, 489.
Losse vs. *Buchanan*, 51 N. Y., 476.
Regina vs. *Stephens*. L. R. 1, Q. B. 702.
Rex vs. *Medley*, 6 C. & P., 292.

Wood on Nuisances, at Section 832, observes—

"As in actions for a *tort*, all who are engaged therein are principals, and equally liable therefor in whatever capacity they were acting."

Point 6.

The Legislation of California, from a very early period, has been very pronounced against public and private nuisances, and complete in furnishing civil and criminal remedies for the prevention and suppression of the same.

Act of April 10, 1850, "To prevent Obstructions in Navigable Streams."

Session Laws of 1850, page 188.

This is like the Statutes of Nevada, Sec. 130, 1 Compiled Laws, page 582.

Section 249 of Practice, Act of 1851 (Session Laws, page 249)—

"Anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of action."

Civil Code, sec. 3479—

"Anything which is injurious to the health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake or river, bay, stream, canal or lawn, or any public park, square, street or highway, is a nuisance."

Section 3480—

"A public nuisance is one which affects at the

same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."

Section 3490—

"No lapse of time can legalize a public nuisance amounting to an actual obstruction of a public right."

Section 3491—

"The remedies against a public nuisance are:

1. Indictment or Information.
2. A Civil Action.
3. Abatement."

Sections 3501 and 3502--relating to private nuisances and the manner of their abatement.

Section 3514—

"One must so use his own rights as not to infringe upon the rights of another."

Penal Code, sections 370 and 371, substantially follow the language of sections 3479 and 3480 of Civil Code—and section 372—reading—

"Every person who maintains or commits any public nuisance, the punishment for which is not otherwise prescribed, or who wilfully omits to perform any legal duty relating to the removal of a public nuisance, is guilty of a misdemeanor."

Section 611—

"Every person who unlawfully obstructs the navigation of any navigable stream is guilty of a misdemeanor."

Point 7.

The decisions of the Supreme Court of California have rigidly and in almost every conceivable form of controversy enforced the Statute concerning nuisances, and refused to admit that there was any limitations upon the maxim *sic utere tuo ut alienum non laedas.*

The following cases only are cited and relied upon from among the great number:

Fitzgerald vs. *Urton*, 5 Cal., 308; a controversy originating in Sierra County, between a miner and a town lot owner.

Weimer vs. *Lowry*, 11 Cal., 104; a controversy originating in El Dorado County, between a farmer and a ditch owner.

Boggs vs. *Merced Mining Co.*, 14 Cal., 279; a controversy started in Mariposa County, between a mining company and the owner of the Fremont Grant.

Esmond vs. *Chew*, 15 Cal., 13; a controversy beginning in Nevada Co., between two miners—one claiming the "right from necessity" to cover up the mining claim of the other.

Rogers vs. *Soggs*, 22 Cal., 452; starting in Nevada Co., and where the previous decisions of this Court are reviewed, and where the offensiveness of the miners' pretensions were declared and rebuked—as they also were in *Smith* vs. *Doe*, 15 Cal., 101.

Hill vs. *Smith*, 27 Cal., 476, originating in Placer Co., and especially noticeable for its meeting with the approbation of the Supreme Court of the United States, in the case of *Atchinson* vs. *Peterson*, 20 Wallace, 515.

Logan vs. *Driscoll*, 19 Cal., 623, a suit begun in Nevada County, and involving the question as to whether an upper miner could cover up the mining claim of another lower down on the ravine. The Supreme Court, affirming the judgment of the District Court of Nevada County, where, as the testimony shows, it has always been considered as "good law," said:

"This position (of defendant) is in conflict with the maxim—*sic utere tuo ut alienum non laedas*, and we are not aware of any principle upon which it can be maintained. The defendants are entitled to use their claims in a lawful manner, but no act can be considered lawful which precludes the plaintiffs from the enjoyment of their rights."

Courtright vs. *Bear River Ditch and Mining Co.*, 30 Cal., 57. This suit originated in Placer County. It was a suit by a farmer—Courtright—to protect his land from being overflowed by the water in defendant's ditch, which carried a large quantity of mining debris. The opinion of the Court, after citing the Statute of Nuisances, Section 247, of the Practice Act of 1851, said:

"Injuries occasioned by wrongfully causing or permitting the water from water ditches to flow upon or over the lands or mining claims of others, have always been treated in this State as nuisances, and actions to prevent or abate such nuisances are of every day occurrance."

Richardson vs. *Kier*, 34 Cal., 63, likewise originating in Placer County, and was a square contest between a farmer and a ditch owner who complained that the latter overflowed and injured his land.

This case, speaking of the duty of the defendant at page 74, declares that—

"He is bound to so use his ditch as not to injure the plaintiff's land, irrespective of the question as to who has the older right or title, he is bound to keep it in good repair, so that the water will not overflow, or break through its banks and destroy and damage the lands of other parties."

And we especially direct the attention of the Court to what was there said by the Court in reply to the suggestion of the defendant, that he was not responsible for the mud, sand and slickens carried by the water of his ditch, and by its overflow deposited upon the plaintiff's lands inasmuch as he had sold it to miners for mining purposes before the injury to plaintiff occurred. This was the reply of the Court :

"Nor can he, (the defendant), shield himself from responsibility because he may have sold the water to miners, who used it for mining purposes before it reached the ravine, if the water is delivered to the miners at a point from which it must unavoidably run into the ravine, and necessarily result in the injury complained of. In that event the miners are not the only *tort feasors*."

Potter vs. *Fremont*, 47 Cal., 465, was a case where a farmer procured an injunction prohibiting the owner of a sawmill from casting the sawdust made by the mill into the creek, which ran through the plaintiff's farm.

Robinson vs. *Black Diamond Coal Mining Company*, 57 Cal., 412, a suit brought by L. L. Robinson, (the principal hydraulic miner in the State,) when occupying the position of Vice-President to the Miners' Association to protect some of his lands in Contra Costa County from being injured by the debris from the defendant's coal mine. There it was held that the defendant was just as responsible for the damage as if if it had dumped its debris from carts or cars on to Robinson's land, instead of putting it into Quercus Creek, whose waters transported it there.

Point 8.

The Legislation of Congress in no conceivable way sanctions the pretense of the hydraulic miners, that it licensed their operations or conferred upon them the right to commit public and private nuisances.

The United States holds its mineral lands in California as every other private proprietor does. In authorizing their sale she did not, nor could she confer upon her owners the right to use them in ways damaging to private property or to navigation, or in violation of the reserved police authority of the State.

In receiving from the defendant the $2.50 per acre, the price fixed by the law of 1872, (amending that of 1870, the first law for the sale of placer mines), and in issuing a patent for the lands sold, she in no sense guaranteed to these purchasers any different use than when she sold a farm to a farmer under the old pre-emption act of 1841. Her patent in either case only passed the title, which before its date was in the United States.

See very elaborate opinions of Judges Sawyer and Deady, delivered January 7, 1884, in the case of *Woodruff* vs. *North Bloomfield Gravel Mining Company et al.*

Point 9.

Digging and washing the ground for gold, commonly called—gold mining—is not a branch of commerce, but is a strictly private pursuit.

That it is not a branch of commerce, nor within the meaning of the Federal Constitution, foreign commerce or commerce between the States, is aptly stated by Judge Temple in his Opinion, at folio 233.

That it is a purely private pursuit is expressly declared in the case of the *Consolidated Channel Co.* vs. *C. P. R. R. Co.*, 51 Cal., 269., and that it cannot be advanced by the use of the public revenue—*i. e.*, taxes. We have the authority of the celebrated case of the *People* vs. *Parks*, 58 Cal., 624.

Point 10.

Pretended, Customary and Prescriptive Rights.

There are alleged to have grown—not out of the local district mining law and regulations, for these related exclusively to the size, manner of taking up and holding mining claims, and did not purport to regulate the manner in which mining claims should be worked, nor the manner or places in which the mining debris should be dumped—but out of the practices of the miner in such localities.

There are many answers why the alleged customs or prescriptions are bad, some of which appear in the opinion of Judge Temple, and most all in the opinions of the Federal Judges in the Woodruff case. Apart from the consideration that the United States and California have made it impossible, by their legislation, to sanction a custom so injurious to navigation and habitation, *it should be remembered that neither government was ordained for such a purpose.*

In England, the dominion of the Crown over navigable waters of the realm is but *a superintendence for their preservation.*

Att'y-Gen. vs. *Richards*, 3 Antruther, 603.

Again, the judicial decisions of both governments render impossible their recognition.

In the case of *The Penn. Coal Co.* vs. *Sanderson*, a Pennsylvania case, decided in 1880, it was held

that a custom could not authorize the drainage of a coal mine into a useful water course, notwithstanding such a doctrine might result in the suppression of coal-mining in that State.

What is a Custom?

Fortunately the meaning of the word "custom" is not involved in doubt. It would be strange if we did not know the difference between a habit or practice of doing a thing as each party pleased and—a custom.

"A custom (1 Blackstone, 64) is a compulsory rule, which applies alike to all parts of a kingdom or State, is a law of which Courts take judicial notice, and is to be found in the statutes, or in the judgments of Courts of high authority; and although it is said that the rules of common law had their origin in provincial or local customs, collected and made general by Alfred, King Edgar and Edward the Confessor, yet by reason of the generality of their application and operation they are called laws, and not customs."

"Yet the common law which applies alike to all parts of the State or kingdom, recognizes and enforces certain local customs of a well defined character, within limited districts; which, to be of any validity at all, must have, among others, the following characteristic: They must be compulsory, 'and not left to the option of every man whether he will use them or no.'" (1 Black's Com., 78).

A mere mode of doing work, which any man may conform to or not at his option, is not a custom in the sense of a local law, but only a practice. The practice of working mines, or harvesting wheat, in a particular mode, within certain districts, is not cumpulsory, however uniform; and therefore not a custom in the sense of law. But

admitting that the mode of mining by the hydraulic process is compulsory, in the mining districts, as between the miners of those districts, this custom does not cover the question in this case. What is complained of here is not the mode of mining, but the injury to the valley and its navigable streams. The custom to be established is that of overflowing and thereby destroying the agricultural lands of others, and the Sacramento river and cities seventy miles distant from the mining district. To be valid it must appear that such a custom is compulsory on the farmers outside of the mining districts, and persons interested in navigation, including the State.

Trywhitt vs. *Wynne*, 2 Barn, and Ald., 561, Bainb. on Mines, 16, 17.

There was no evidence that such a custom was ever enforced, even within any mining district, much less in the valley.

The decisions of our Courts show that the practice of mining, in any mode, by which the property of others is injured or destroyed, has been resisted and not enforced, even as between the miners themselves.

It is of the essence of these customs (common law customs as well as of our statutory miners' customs), that they are local and limited to defined districts, less than the State; else they would be laws, evidenced either by our statutes or by the decisions of our Courts. But all compulsory customs, recognized or enforced by our statutes or Courts, have been local and confined to small mining districts.

What is the limit of the district within which the defendant may mine in such mode as to destroy their neighbors' property? For, to be bound by such mode, the plaintiff must be within such district.

Rex vs. *Saltern*, Cald. 444.

Yet there was no evidence tending to show such to be the fact, but the contrary is proven.

1 Blk. Com., 74 to 76.
Wash. on Easements, 122.
Trywhitt vs. *Wynne*, 1 Barn. & Ald. 561.
Bainb. on Mines, 16 and 17.
1 Blk. Com. 76, side p.

To have the force of law a custom "must have been peaceable and acquiesced in; not subject to contention and dispute; for as customs owe their origin to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting."

1 Black's Com. 76.

Our reports show that the alleged custom has been disputed at law by both miners and farmers, and that our Courts have adjudged it invalid.

Customs must be reasonable, and when in derogation of the common law must be construed strictly.

The custom claimed is in derogation of the common law maxim, "sic tuo utere," etc., and is unreasonable.

An alleged custom that no cattle should be put into the common until the lord of the manor had first put in his, was held bad because unreasonable, as the lord may never put in his. Was that

more unreasonable than that defendants should so use its property as to destroy that of plaintiff?

See further as to unreasonable customs. See *Hilton* vs. *Granville*, 5 Adol. & El. 724, where a custom to undermine a copy-holder's house was held invalid because unreasonable.

Washb. on Eas. 128.

In *Codman* vs. *Evans*, 5th Allen, 308, the Court said of a custom to extend bay-windows over the land of other people:

"If it be a custom to erect them over the land of other people, such custom is illegal, and the defendant cannot justify himself in occupying a neighbor's property as a part of his dwelling house on the ground that such trespasses are customary in Boston."

The custom claimed is totally inconsistent with and squarely opposed to our statutes on the subject of nuisances. (C. C. P. Sec. 731; C. C. Sec. 3479; C. C. Sec. 3514, and the common law on such subject, adopted as the rule of decision in 1850.) The last section of the Civil Code provides that "one must so use his own rights as not to infringe upon the rights of another."

Customs are against common right (*Hicks* vs. *Woodeson*, 4 Mod. 342), and therefore presuppose an original actual deed or agreement (2 Blk. Com. 30 *et seq.*), and as a consequence there can be no custom in a matter regulated by law. (8 M. R. 309.)

Customs, therefore, have four essentials, viz: a reasonable commencement, certainty, continuance and an agreement with the king's prerogative.

(3 Salk. 113; 3 Mod. 133, 293.) So it is that all unjust and unreasonable customs are void. *Hilton* vs. *Earl of Granville*, Dav. & M. 214; *Mitchell* vs. *Reynolds*, 10 Mod. 133; *Parramore* vs. *Verrall*, 2 Aud. 152, and all customs repugnant to the common law are void. (7 Mod. 29.) No custom can enable one to do a tort. (Cro. Jac. 80.) In *Fitch* vs. *Rawlings*, 2 H. Black, 393, it was held that a custom for all of the inhabitants to enter upon a certain close and play at cricket was good, but would be bad if the claim was in favor of all persons happening to be in the parish. (See, also, *Pearsall* vs. *Post*, 20 Wend. 111, 128; and *Manning* vs *Wasdale*, 5 Adolph. & E. 758; *State* vs. *Wilson*, 42 Me. 9; *Gardiner* vs. *Tisdale*, 2 Wise. 152.) So a custom to be good must be restricted to the persons who reside permanently in a district. The class of persons must be susceptible of identification, for where a custom was claimed in favor of the poor and indigent householders of a certain village, etc., it was held bad on two grounds (*Selby* vs. *Robinson*, 27 R. 758): First, because it was wholly undefined who came under such a description, and could avail themselves of it; and, second, because it was a claim to take profits of land, which could only be prescribed for in a "que estate." So the custom must be reasonable, not only in its subject matter but in its mode of enjoyment, in order to be lawful. Thus it was held that a custom would not be good for all the inhabitants of a village to ride over a certain close at such times of the year as the owner had corn growing or standing thereon,

because it would tend to destroy the profits thereof altogether.

Bell vs. *Wardwell*, Welles, 202.

And even if the custom be general, but is unreasonable or dangerous, or productive of injury, it will not be good.

Hill vs. *Portland R. R. Co.*, 55 Me. 438.

So a claim that is destructive of the subject matter of the grant cannot be set up by any usage.

Horner vs. *Watson*, 79 Penn. St. 242.

An examination of the cases cited by defendants' counsel to sustain their theory that the right to flow with mining sediment the lands in the valley and water courses might be gained by custom, will show that they fall far short of the mark.

Thus *Wright* vs. *Williams*, 1 Mees & Welsby, 77, involved nothing but a prescriptive right to foul a water course acquired by twenty years user, which was held good under the statute of William IV., chapter 71.

Carlyon vs. *Lovering*, 1 Hurlsby & Norman, Exchequer, 784, gave effect to a custom of the stannaries of Wales, which had been confirmed by an Act of Parliament. The plaintiff's estate was situate within the stannaries, and there had been forty years' acquiescence in the acts of which the plaintiff complained. The opinion said that the right claimed had likewise been gained by prescription; and Cooley on Torts cites the

case as one of prescription. We have already shown with great clearness that no prescription or custom can confirm a public nuisance. It is clear that no custom is good unless a prescription is first established, because a custom to be good must have had a beginning time out of mind. It was expressly said in this case, that the effect of the custom is not to destroy plaintiff's lands, though it may be detrimental thereto; and again, speaking of the custom, the Court observed: "It is not to take the land or any part of it, but merely to pollute the water of the stream."

There is this difference between a prescription and a custom: the former is personal, and always alleged in the person: the latter is local, and serves for the inhabitants of a town, etc.; or as to insensible things; as to devise lands. (*Foisten* vs. *Crackwoode*, 4 Co. 31, b. 6 Co. 60 b. Poph. 201.) But where a prescription is pleaded by way of custom (as sometimes it must be), the nature of it is not changed—it is a prescription still.

Point 11.

As no Lapse of Time confers the Right to Maintain a Public Nuisance, the Action was not Barred by Limitation nor by Delay in Suing—so-called Acquiescence—on the one, nor by the Prescription.

In view of the well-settled doctrine of "coming to the nuisance," an action like this is embarrassed but slightly (if at all) by delay in suing. Nuisance makers cannot say that any part of the earth's surface is sacred to them, nor that they have a vested right to prevent navigation, habitation or cultivation at any point, however remote from the origin of the nuisance.

No Limitation—No Laches.

No time, as we have already seen, bars the State from insisting upon the suppression of a public nuisance. No length of time gives the maker of a public nuisance the right to continue his vocation — his nuisance. It is all the same whether she sues late or early, laches cannot be imputed to her. The maxim of England is the maxim of the free States of America—"*Nullum tempus occurrit regi.*"

When the State sues for a suppression of a public nuisance, but two questions are to be considered:

1. Is the act complained of unauthorized by law and a nuisance to a considerable number of persons?

2. Did the defendant commit it or contribute to it?

Both being answered in the affirmative, the decree of the Court passes, as of course, abating the nuisance or enjoining its continuance.

In 49 New Hampshire, (page 240), an injunction was asked by the Attorney-General against a certain company for not providing in dams, constructed by it in unnavigable streams, fish-ways for the fish which had been accustomed to pass up and down the streams before the dams were put in it. The suit was brought by the Attorney-General after the lapse of over twenty years, and the decree of the Court ordered the dams to be abated as nuisances, notwithstanding the apparently great delay. The following are extracts from the opinion:

"The case renders it necessary to decide whether the respondent could, by twenty years' adverse use, acquire a right against the State. The Legislature has fixed on twenty years as the proper time of limitations for bringing actions to recover real estate. By analogy to the rule, that twenty years' adverse possession gives a title to real estate, the Courts have held that adverse user for the same length of time is sufficient to give title to an easement belonging to real estate. (*Wallace* vs. *Fletcher*, 30 N. H. 434, p. 437.) The rule of law on this subject is evidently based, in part, upon the presumption that the average of mankind will seek to enforce their private rights, if they really have any, before the expiration of twenty years, and that few persons will lose valuable rights by the adoption of this period of limitation.

"Experience does not justify the presumption that the community at large will assert their public rights with the same promptness with which individuals assert their private rights. The opposite is notoriously true. 'Individuals may reasonably be held to a limited period to sue adverse occupants, because they have interests sufficient to make them vigilant. But in public rights of property each individual feels but a slight interest, and rather tolerates even a manifest encroachment than seeks a dispute to set it right.'

"Sargent, J., in *Com.* vs. *Alburger*, 1 Wharton, 469, says: 'In private nuisances and civil actions, presumptions of grant from length of time may be rebutted by proof that the enjoyment was acquiesced in, not by the owner of the inheritance, but by one who possessed a temporary interest only, such as a tenant for life or years, whose negligence or laches cannot be allowed to prejudice the owner of the inheritance.' * * * How much less, then, ought the acquiescence affect the public rigts. (Duncan, J., in *Com.* vs. *McDonald*, 16 Sargent, and Rawle 390, p. 400). The State is impersonal. 'The people do not and cannot legally act in a body. Their power must of necessity be exercised only through agents. It cannot be expected that those agents will manifest the same vigilance in detecting and resisting encroachments on public interests that individuals evince in the protection of their private rights. Moreover, the State officers are generally few in number and fully occupied with the regular routine of public duties. They do not generally institute proceedings to punish violations of the laws, except at the instigation of individuals. It may be doubted whether these officers are ever aware of a very large proportion of the infringements on the rights of the State.'

"It has been thought by some that the maxim '*Nullum tempus occurrit regi*" is an outgrowth of monarchical despotism, and therefore inapplicable under our republican form of government. But, whatever may have been its origin, this maxim has now for a long time been maintained as a part of the common law, not for the personal convenience of the sovereign, but 'for the security and benefit of the people.' The true reason of the maxim, according to Judge Story, 'is to be found in the public policy of preserving the public rights, revenues and property from injury and loss by the negligence of public officers. And though this is sometimes called a prerogative right, it is, in fact, nothing more than a reservation or exception introduced for the public benefit, and equally applicable to all governments.' (*United States* vs. *Hoar*, 2 Mason, 311, pp. 313–14). See also Parker Baron Hardres, p. 27.

"Weston, J., in *Willam* vs. *Berkley*, Plowden, 123, pp. 242–243,; Co. Litt.. 90b: 'All the reasons in support of this rule in the case of a King apply with greater force here, where the people are the sovereigns.'

"The maxim in question is not a part of the common law 'repugnant to the rights and liberties contained in the Constitution of New Hampshire, and may well be held to remain in force here.' (Constitution of N. H., Article 90)."

It is because of this rule that no title by occupancy or adverse possession can be obtained to the streets or public squares of a city, town or village. The most rigid protection imaginable has always been extended to the navigation of streams. No excuse has ever been accepted for destroying a navigable stream. Cooley on Torts, pp. 613 and 614:

"It is a familiar principle that no lapse of time can confer the right to maintain a nuisance as against the State. On the other hand, where a nuisance is purely private and concerns only the one person, or the few who are injured, its maintenance for the period of prescription, without interruption, will bar any subsequent suit. On the whole, the better doctrine would seem to be that the acquisition of rights by prescription can have nothing to do with the case of public nuisances, either when the State or when individuals complain of them."

See

Folks vs. *Chad*, 3 Doug., 340.
Weld vs. *Hornby*, 7 East, 195.
Simmons vs. *Cornell*, 1 R. I., 519.
Knox vs. *Chaloner*, 42 Maine, 150.
Mills vs. *Hall*, 9 Wend., 315.
Renwick vs. *Morris*, 4 Hill, 621; 7 Hill, 575.
Kellogg vs. *Thompson*, 65 New York, 88.
Veazie vs. *Dwinell*, 50 Me., 479.
Lewis vs. *Stein*, 16 Alabama, 514.
Stoughton vs. *Baker*, 4 Mass., 522.
Arundell vs. *McCulloch*, 10 Mass, 70.

Point 12.

Injunction is the Appropriate Remedy.

The following authorities are selected from a much greater number:

Courtright vs. *Bear River Co.*, 30 Cal. 573.
Inchbold vs. *Barrington*, L. R., 4 Ch., 388.
Pennsylvania vs. *Wheeling Bridge Co.*, 13 How. 518.
Story's Equity Juris., Sec. 77-925.
Wood on Nuisances, Sec. 779.

As was said by the Supreme Court of Massachusetts in 13th Allen, 16:

"The acts of the defendant tend to create a nuisance of a continuous and constantly recurring nature, for which an action of law can furnish no adequate relief."

From a danger point of view, the Court will remember, that it was proven in this case that the flood of 1881—preceded by a rainfall of less than one-half of that which fell in the winter of 1861-2—caused the water to be twenty-six inches higher in the Sacramento River at Sacramento—and to extend one and a half miles further west in Yolo county than the waters of that memorable flood. The Bassett survey shows that if the American River during the flood of 1861-2 had been one foot higher at Rooney's ranch—five miles east of Sac-

ramento city—the latter place would have been overflowed by American River water, entering her limits from the direction of the county hospital.

The fact is—that the bed of both rivers will not bear any more raising, consistently with the safety of the adjoining territory.

J. M. Upham, Vol. 6, page 2,014, shows that a slight elevation of the river bed destroyed Sherman Island.

Point 13.

Mining Wash of the American Basin compared with Natural Wash.

This subject will be found referred to by Judge Temple.

Hall, the State Engineer, most largely notices it in his testimony. He fixes the annual mining wash, in the American basin, at 8,604,000 cubic yards—produced by the use of 1,912,000 miner's inches of water. Vol. 15, pages 4,229-30. The duty of a miner's inch he states to be $4\frac{3}{10}$ cubic yards. Vol. 15, p. 4,379. The *annual natural wash he states to be but 1,000,000 of cubic yards*, and the amount which the American River annually carries in suspension he fixes at 4,500,000 of cubic yards.

In estimating the natural wash at one million of yards, he necessarily, as well as in fact, makes the erosion or lowering of the entire drainage basin about 1 foot in 2,000 years. A very large estimate in view of the degradation of the Mississippi basin, (which includes the Ohio and Missouri), being only 1 foot in 4,640 years. (Le Conte's Geology, page 11).

A very large estimate in view of the unchanged condition of the rivers entering the Sacramento Valley—*on which there has been no mining*.

This is shown by the testimony of the following witnesses:

John Bidwell, vol. 44, pages 12,893 to 12,948.

W. S. Green, vol. 44, pages 12,976 to 13,068.

B. Gray, vol. 44, pages 12,948 to 12,975.

E. Comstock, vol. 45, pages 13,135 to 13,179.

W. B. Treadwell, vol. 45, pages 13,179 to 13,228.

The rocky sides and bottom of the American River—at all points above Folsom—embracing probably nineteen twentieths of its entire length, and the unrivalled purity of its waters above the mining belt—most probably proves that natural erosion does not proceed within its basin at half the rate fixed by the State Engineer—whose views upon that subject—a duplicate of his testimony—appears in his report of 1880 to the Legislature at pages 30 and 31.

Point 14.

Gold Mining.

This alluring pursuit has never paid.

California allowed it to be freely practiced. The tables which we have seen fix the cost of producing the first 500 millions in California at several times that sum.

Placer or surface mining in this State substantially ceased about the first of 1857—the Frazer River era.

The State was then in an almost calamitous condition. There were no roads nor railroads; no public buildings; no great State institutions; no great schools, hospitals or charities; no orchards; no vineyards; little or no horticulture or agriculture; a meagre judiciary and no jurisprudence. Bankruptcy ensued in several of the mining counties. So ended the placer or surface mining era, and it left large stores of water without use or market, and which subsequently fell into the hands of the hydraulic miners.

Hydraulic mining began in earnest in 1865, although the Little Giant was not invented until 1868.

Bowie on Hydraulic Mining, page 13.

It was mining *sui generis* in the respect, that it displaced matter on the mountain tops, snugly at

rest within great rims of slate rock, completely encircling them (Bowie, page 4)—matter which could only be got into the rivers and their tributary streams by means either of deep cuts or tunnels.

The projectors of this system seemed to be aware that sooner or later it would be challenged by the agricultural and commercial interests. (Bowie, page 13).

What testimony there is in the record goes to show that it is unprofitable.

To get at a streak of bottom pay gravel, ten feet thick, often 100 or more feet of overlying gravel, which does not pay the expense of washing, has to be washed away.

The New Era.

Twenty years later, a new population began to heal the scars made by early mining, and to start the worn out mining counties on the road to *enduring* prosperity.

The principle obstacle they have met with came from the monopoly and corruption of their unrivalled water supplies by hydraulic mining corporations.

But in the ratio that this "most energetic demoralizer" has been subdued have these counties gained in wealth.

This is shown by the tables made up each year in the Surveyor-General's office, based upon the returns of the Assessors; both the tables and reports being official publications.

From such tables, it is strikingly apparent that the mining property of all kinds, even after having added to it the ditch, canal and water property, is but a trifling factor of the whole wealth of such counties.

Placer County, according to her assessment list of 1878, had property of all kinds to the value of $5,774,960, which by 1883 had increased to $8,650,400, yet the aggregate value of all mining property was, in 1883, but $357,255, or about four per cent of the whole. The ditch, water and canal property of that year was assessed at $153,504, or about two per cent of the whole.

Nevada County increased in wealth from 1878 (when hydraulic mining was practiced without stint or fear), $6,840,413 to $8,469,555—after the decision of this case in 1882—and the increase for the succeeding year was six per cent.

The wealth of El Dorado, all told, in 1879, was $2,325,525, which in 1883 got up to $2,963,063, of which mines embraced nine per cent and ditches four per cent.

Sierra County had in 1879 but $751,005 in wealth, which in 1883 was $1,663,972.

To understand the nature of the dreadful vortex into which *investments* for all kinds of mining enterprises have gone—it must be remembered—that all the taxable property of the mining counties of Placer, Nevada, El Dorado, Sierra, Alpine, Calaveras, Inyo, Mariposa, Shasta, Siskiyou, Trinity and Tuolumne only amounts to $33,531,082, and considering that 20 per cent. or

six and a half millions of dollars—is more than the value of all descriptions of mining and ditch property therein — the dreadful shrinkage of such investments becomes woefully apparent.

Twenty of the principal mines on the Comstock increased their market value from $4,696,700 in November, 1870, to $271,059,200 in January, 1875, to be reduced by February, 1882, to $6,052,200. One picture is very much like the other.

The testimony in this case shows that hydraulic mining has been specially unremunerative, and the amount invested in it throughout the State does not exceed five millions all told.

The distribution of the wealth per capita throughout the State is about $330 to the man in the mining counties; $800 per capita in the agricultural. In San Francisco, Santa Clara and Los Angeles it is $980 per head.

Other information of a like character and of which courts take judicial notice can be adduced to show that when the great water supplies of the mountain counties are devoted to useful purposes —as contradistinguished from turning mountains into mud and sending it to the sea—a great and prosperous future awaits the mountain counties of California.

Point 15.

Damages from Hydraulic Mining Debris.

The testimony shows that the Sacramento, above the mouth of Feather, is still a clear stream —as clear as it ever was. Feather River is, however, a great debris spout — so damaging to the Sacramento down to the mouth of the American (about 28 miles) that its width has been lessened one-third, and its bed raised 10 feet. This was done by a debris deposit, estimated by the State Engineer in his 1880 report to the Legislature to be, up to the beginning of 1879, 29,936,-225 cubic yards. The succeeding sections of the Sacramento are filled to the same extent, and the same authority, part of the evidence in this case, gives the deposit in the remaining sections as follows: Mouth of American to Grand Island, 28,-756,272 cubic yards; Old River channel, 6,809,-910 cubic yards; Steamboat Slough, 9,471,342 cubic yards; to mouth, 9,373,164 cubic yards.

Suisun Bay, the testimony proves, has been so filled that it is now more like a river than a bay.

The deposits in the Straits of Carquinez are, likewise, immense and of a damaging character, on both the Benicia and Martinez sides. San Pablo Bay has 79,000,000 cubic yards of it in the main ship channel, reducing its width one-third.

San Francisco Bay is more or less affected, the pilots describing the different shoals.

The raising of the river-bed had caused untold losses to the farmers living on the river margins and had imposed levee taxes frequently amounting to $30 per acre. Navigation, of course, had been largely impaired, beginning to be serious in 1872 and increasing with great rapidity. Up to 1870, the large and well-remembered steamers, such as the Senator, New World, Yosemite, Chysopolis and Capitol, could and did make regular trips, with large loads of freight, to Sacramento. Islands of sand from Feather and the American rivers were frequently encountered by the steamers, and the waters of the Sacramento River was constantly charged so highly with sand that the waves following in the wake of the steamers, on their reflux, would leave a sprinkling of sand on the shore. Capt. Foster, in his testimony, describes many vain attempts to raise vessels sunken by accident. The commerce of the Sacramento River is very large. The same witness mentions the year in which one transportation company alone carried through it 100,000 tons of wheat.

The endangered lands are the most fertile in the State, used principally (below Sacramento) for orchard, dairy purposes, and stock raising. The grade of the river is but four inches to the mile, and it needs badly water of high scouring power to clear out its gorged channels.

All the damage in the Sacramento has been done by the clay and fine sands — such as

move in suspension, *and which cannot be impounded.*

To estimate the extent of the damage to the lands along the American and Sacramento rivers from hydraulic mining debris, including that suffered by the cities, towns and villages on their banks, in connection with crops injured and cost of levees, would require startling figures. It would run way up in the millions, without taking into consideration the great injuries to navigation. In the transactions of the State Medical Society for the year 1881 will be found an elaborate and truthful description of that damage.

When our adversaries argue—as they will—that the Gold Run Mine is not a material contributor to this damage and can safely—be suffered to work out its deposit of thirty millions of yards, we direct the Court's attention to the Payson report (in evidence) to illustrate what a single hydraulic mine of much smaller dimensions than the Gold Run Mine has done in the way of damage to the Cosumnes River.

At page 19, Lieutenant Payson, of the U. S. Engineer Corps, says:

"The Cosumnes is by far the worst of the southern streams, though even on it the destruction does not approach in magnitude that on the Yuba and Bear. Its bed at the mouth of the canyon has been substantially obliterated, the deposits being nearly level with the banks, and below for several miles has been torn out to five and six times its normal width and choked with sand and gravel. From pretty reliable testimony I have estimated the filling of its bed at six feet eight miles

above the railway crossing, fifteen feet at a point seventeen miles above, and twenty feet at the entrance of the canyon, which would correspond to a deposit of some 6,000,000 yards, and a diminution in the water-way of 70 per cent."

On page 20 he continues:

"On the Cosumnes the chief, and in fact the only, hydraulic mine of any consequence is near the foot of its canyon, four miles below Michigan Bar, at 'Hill Top.' Here are extensive gravel deposits on a high ridge, between the main river and Arkansas creek; the banks vary from 15 to 60 feet in depth, and overlie a whitish volcanic ash, which softens by exposure, and is readily cut by the water in the sluices. They have been worked many years, with small heads, 30 to 50 feet, and the dumps in various ravines, on both sides of the ridge, are now so choked with the large masses of tailings, which have been permanently lodged in them, that the grades attainable are very light, four to five and a half inches to the twelve-foot box. The remaining supply is estimated as sufficient for ten or eleven years. Beside the Hill Top claims there are nothing except some insignificant placer workings and the operations of the Chinese along the bars."

Payson's report is corroborated by the testimony of Tom McConnell, a witness for the defense in this case. McConnell swears that the channel of the Cosumnes, is obliterated, and that there is but one mine upon it—the Hill Top Mine —which is located about two miles from the river, and that only the fine material from it enters the river channel.

Point 16.

Dams.

There was spent under the so-called "Drainage Act" $508,493.42. The amount contemplated to be spent under it was nine millions of dollars. The dams constructed under this defunct act disappeared through flood and fire. They were duly warranted to remain by capable engineers—Mendell, of the U. S. Engineer Corps, taking the trouble to vouch for them in a special message to the Legislature. The Milton dam gave way last year notwithstanding the scarcely cold guaranty of Counsellor Byrne that the fame of "the engineer who built it would be as everlasting as his great undertaking." It set loose a wave of water ninety feet high, which carried death and destruction with it for 100 miles—down even to the wheat fields of Yuba County immediately south of Marysville.

Fairchild, in his testimony in this case, describes the disastrous consequences following the giving away of a dam on Pilot creek in 1878—in El Dorado County. The testimony of Carroll, Gwynn, Knight, Morse, Greenlaw and others of plaintiff's witnesses, describe actual exhibitions of hydraulic power on the American River—making it to the last degree impossible that dams would remain in such a torrential stream as the American River is—above Alder creek.

But why should the injured citizens of the valley be compelled to live in the shadow of such terrible menaces as dams are—to property, security, comfort and convenience. The power which carved the great American cañons was water. To suppose that it has not the force to sweep out of its bed the high debris dams—is to misunderstand its laws.

But then—dams will not under any consideration restrain the 30 per cent of the debris which travels in suspension—and which is the prime cause of the great damage to the lower river and adjacent lands.

Neither will dams vouchsafe to us the kind of water which is a necessity to health, society and business—cramming mud down the mouths of citizens—in the interest of persons engaged (according to their pretensions) in furnishing a currency for the world—is better in the breach—than in the observance.

A history will be furnished the Court of the high dams of the world—from the perusal of which it will be compelled to say—that their propensity for giving away in spite of the opinions and expectations of eminent engineers—is remarkable.

The views of Judges Sawyer and Deady on the dam question are unquestionably correct.

Conclusion.

By the laws of Spain and Mexico, as early as 1584, miners were forbidden to wash their ores in the streams, on account of the damage to cattle.

Bainbridge (section 4, page 400) thus treats of the law of England on such and other regards:

"In the absence of agreement, mining adventurers will, of course, be responsible for all injuries occasioned to the owners of property unconnected with the lands in which the mines are worked for the injuries arising from the poisonous or deleterious particles of mineral substances, or from the processes used in smelting or refining ores, they will be liable to compensation by those who have prevented the full enjoyment of the ordinary advantages conferred by Nature. The loss of cattle and other valuable stock may thus fall upon the adventurer, unless these injuries are produced by the negligence or default of the owners or occupiers themselves."

And further observes this author:

"It sometimes happens that injuries are produced by the working of mines in mountainous countries, by the rubbish and refuse of a mine being so placed by the adventurers as to be carried down from time to time by the floods of a stream. If such an injury were proved against the proper persons, the proprietors of these lands would obtain damage for the injury sustained."

Then he asserts that "while there might be some difficulty owing to time and place and floods of a stream, in proving that the damage was done, yet he says that

where it is proven the adventurer committed the injury he must make adequate compensation for all damages."

So much for English law.

The Prussian law was the same, and is now adopted by the German Empire.

The following acts have been held to be nuisances to navigation:

Throwing ballast into the sea in a seaport; *Bucklesbank* vs. *Smith*, 2 Burr, 256. Throwing rubbish from a quarry into a river; *Garrish* vs. *Brown*, 51 Maine, 255. Throwing edgings from logs and boards into a public river—refuse from breweries or any refuse calculated to fill up the stream, or impede navigation, or render the port unpleasant; *Rex* vs. *Medley*, 6 C. and P., 292. Piles driven in the channel of a river; *Toner* vs. *Pettibone*, 2 Wis., 308. A pier in a tidal stream; *People* vs. *Vanderbilt*, 26 New York, 387. These citations can be indefinitely extended.

In *Rex* vs. *Ward*, 4 A. and E., 384, the jury found that the inconvenience resulting from the wharf was counterbalanced by the public benefit. The Court declared the defendants guilty of maintaining a nuisance, and Lord Denman said:

"I must say that if the violation of rights which belong to any part of the public is to be vindicated by the benefit which is to arise in another part of the public elsewhere, we are introducing inquiries of a most vague and unsatisfactory nature, and entering into speculations upon which no Judge can be expected to decide."

Addison on Torts, 11 vol., p. 920.

Wood on Nuisances—sec. 794—illustrating the impossibility of maintaining public nuisances, observes:

"But when any such trade or business is thus established in a convenient place removed from dwellings and public ways, even though it has been carried on there for many years, yet when the place becomes inconvenient, by reason of public roads being laid so near it that it becomes materially offensive to those passing upon them; or when other business is established in its vicinity which is not a nuisance, and which is injuriously affected thereby, by being offensive to those who work there or come there to trade, or when numerous dwellings are erected in its vicinity to which it is a serious annoyance, it becomes a public nuisance and must yield to the public necessity and to the demands of the public interest, notwithstanding that it has been carried on there for more than a century, for no amount of time works a prescription for a public nuisance or other public offense."

It will be remarked that the judiciary was not asked to interfere in this case, until the Legislature had made the costly and losing experiment of attempting to impound mining debris that it did in the drainage act. The Executive Department has always been without authority in the premises—and hence, if the judiciary is powerless to afford a remedy, it would be a practical reversal of the maxim *ubi jus ibi remoedium.*

In this case the path of the Court is, happily, plain; no rubbish encumbers it; an unbroken line of precedents leads directly up to our "statute of nuisances," establishing its wisdom and that of—the great fundamental maxim of society,—insisting upon the enjoyment of all rights in such a manner as to prevent injury, annoyance, inconvenience or

damage to the rights of others. The civil law so declared. The Spaniards and the Mexicans did not allow their miners to violate it, and they provided swift means for its enforcement. The common law of England was equally zealous in insisting upon its observance. It came to this country with its earliest immigrants—not a State in the Union but what has been proud of it. California in her turn adopted it and enforced it. Even the hydraulic miners have been forced to rely upon it. For them to object to its enforcement, is to insist that the Court shall allow the destruction of immensely larger interests than theirs—those more necessary to society—than hydraulic mining.

The judgment of the Court below, it is respectfully suggested, should be affirmed.

ATTORNEY-GENERAL and
GEO. CADWALADER,
Attys. for Plffs. and Respondents.

I. S. BELCHER,
A. L. RHODES,
R. BAYNE,
Of Counsel.

Dated February 25, 1884.

Due service hereof admitted

this 25th day of February

1884

J. R. Byrne &

W. C. Bevans

attys for appellants